No. 15029

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEEN S. MILDREN and DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

APPELLEE'S BRIEF.

ROBERT McWILLIAMS,
848 Marcheta Street,
Altadena, California,
Attorney for Appellee, Jessie Mildren.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statute

Textbooks

No. 15029

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEEN S. MILDREN and DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts as to Jurisdiction.

The statement under this heading contained in the appellants' brief is hereby approved and adopted for the purpose of this brief.

Statement of the Case.

The facts stated under the above heading in appellants' brief are true and correct and are adopted for the purpose of this brief.

Summary of Facts.

The facts stated by appellant are correct but they are stated at such length that a summary of the material facts seems to be in order. Paul Mildren purchased from

plaintiff five life insurance policies on his life during his marriage to Alleen. In 1948 Paul and Alleen executed an agreement transferring certain community property to Alleen as her separate property. Alleen secured an interlocutory decree of divorce from Paul in the San Bernardino County Superior Court in 1953. This decree held that certain property was the separate property of Alleen because of the 1948 agreement. Other property was held community property of the parties and part of it was assigned to Alleen and part to Paul. Among the property assigned to Paul was "life insurance policies." In 1954 Alleen was held in contempt by the divorce court for her refusal to deliver to Paul the five policies involved in this action. All of the proceedings leading to the contempt order described the policies in great detail. No appeal was ever taken from the divorce decree or the contempt order and both have become final.

At the time of the interlocutory decree, April 8, 1953, Alleen was beneficiary on the policies. On June 17, 1953, Paul filed with the insurance company a change of beneficiary blank requesting that the beneficiary on all of the policies be changed to his mother, Jessie Mildren.

Paul died July 21, 1954, without having secured the policies from Alleen and Alleen and Jessie both made claim to the death benefits. The insurance company filed this interpleader action and the trial court awarded the death benefits to Jessie and Alleen filed this appeal.

ARGUMENT.

Appellants' brief lists six points but there is overlapping and repetition in the statement so we are summarizing her argument as an introduction to our answer.

The divorce court tried to assign the policies to Paul. However, appellant argues that the court failed because the description of the policies in the decree was void for uncertainty.

Therefore, appellant takes the position that the policies were not affected by the divorce decree and remained either the separate property of Alleen under the 1948 agreement or else the community property of Paul and Alleen. Counsel argues that if the policies were the separate property of Alleen, then Paul could not give the death benefits to Jessie by changing the beneficiary. Or if the policies are the community property of the parties, then Paul could give only one-half of the death benefits to Jessie by changing the beneficiary.

I.

The Interlocutory Divorce Decree Was Effective to Transfer the Insurance Policies Involved in This Action to Paul Mildren and to Cut Off the Interests of Alleen Mildren.

The informal opinion of the trial judge in the divorce action found that the "life insurance policies (see defendant's Exhibit E)" were community property and awarded them to the husband, Dr. Paul Mildren. [Jessie Mildren's Ex. 4.] It was stipulated at the time of the trial of this case that "defendant's Exhibit E" was a

letter from The Mutual Life Insurance Company of New York, plaintiff in this action. Obviously it was referred to for a description of the life insurance policies. The opinion directed Mr. Taylor F. Peterson as plaintiff Alleen's attorney and who is also Alleen's attorney in this case to prepare the interlocutory decree and he prepared it on his own stationery (see photostatic copy of the interlocutory divorce decree). [Jessie's Ex. 2.] However, he omitted the reference to "defendant's Exhibit E". Exhibit E has mysteriously disappeared from the divorce files and is not now available. [Tr. of Record, pp. 160-162, 168.] It was obviously referred to for a more complete description of the life insurance policies as undoubtedly any letter from the life insurance company would refer to the policy numbers of the policies about which the letter was being written.

Now it is the contention of Mr. Peterson that he prevented the interlocutory decree from transferring the policies by omitting the policy numbers and thereby making the part of the decree awarding the life insurance policies void for uncertainty. On this basis he claims for his client over $13,000.00 that the court tried to award to the husband, Dr. Paul Mildren.

It is our contention that the interlocutory decree did transfer the policies to Dr. Paul Mildren.

The decree awards "the life insurance policies" to the husband, Dr. Paul Mildren. By this language alone, even without referring to the other documents in the file, it is apparent that the court was referring to all of the life insurance policies owned by the parties. If the court had wanted to award one or several but not all, then the court would obviously not have used this language

but would have indicated which life insurance policies were intended.

It is admitted that the life insurance policies involved in this action were community property of the parties and there is nothing shown in the evidence or arguments that could be the basis for any doubt that these policies involved in this action were intended to be included in the words "the life insurance policies."

It is, of course, apparent that the court intended to award some property to Paul Mildren by these words and if possible some effect should be given to this provision.

> "It is a well established rule that an interpretation upholding the validity of a judgment is favored * * *."
>
> *Tonnesen v. Tonnesen* (1954), 126 Cal. App. 2d 132, 271 P. 2d 534.

The description of personal property in a judgment or decree is sufficient if it identifies the property so that it can be complied with. The parties to this agreement knew what life insurance policies they had and there could be no uncertainty between them as to what this provision meant. Appellant has never even suggested that there was any actual uncertainty or doubt as to what life insurance policies were intended. She bases her claim squarely and frankly on an alleged technical defect introduced into the judgment of the court by appellant's attorney. As she testified at the trial, Alleen S. Mildren had the policies continuously from 1948 until they were produced by her and put in evidence at this trial. [Tr. of Record, p. 130.]

> "It is true that findings, as well as the judgment based thereon, should be definite and certain. At

> least they should be sufficiently clear and definite to enable a party to comply with their requirements. * * * as between the parties to this action, we believe the findings and judgment, in this respect, are sufficiently clear and definite to enable defendant to comply with its requirements. * * *."
>
> *Kittle v. Lang* (1951), 107 Cal. App. 2d 604, 237 P. 2d 673.

If there had been any doubt as to which policies were intended, Mr. Peterson would have found out and made it clear when he drew the interlocutory decree. Furthermore, if there had been any doubt as to which policies were intended, Mr. Peterson would have raised the issue at the time of the trial on the order to show cause and he would have appealed the order of the court holding his client in contempt for her failure to turn over the life insurance policies which were completely described with policy numbers in the order. At least he would have made a motion for a new trial.

If there had been any doubt about which insurance policies were intended by the interlocutory decree, or if Mr. Peterson had believed that the decree was void for uncertainty, he would not have written the letter set forth in the pre-trial order at page 79, Transcript of Record.

There was not the slightest doubt or uncertainty on the part of anyone connected with the divorce action, including the parties and their counsel, which policies were described by the decree. It is significant that no attempt was ever made to change the description of the policies in the interlocutory decree and no objection to the description of the policies was ever made in connection with the contempt proceeding—it shows very clearly that there

was no uncertainty on the part of anyone what policies were described in the interlocutory decree.

There can be no doubt that the interlocutory decree description was "sufficiently clear and definite to enable the plaintiff (Alleen) to comply with its requirements."

The parties always dealt with the policies as a unit. Alleen testified at the time that her husband brought all the policies to the home place in a shopping bag. All the policies were taken together to Mrs. Maycock and all of the policies were taken from Mrs. Maycock to the safety deposit box. [Tr. of Record, pp. 126-128.]

> "A construction adopted or acquiesced in by the parties will not be changed without strong reason."
>
> *Parten v. First National Bank and Trust Co.*, 283 N. W. 408, 204 Minn. 200, 120 A. L. R. 862.

See also

> Annotation at 120 A. L. R. 868.

It is true that some descriptions of property in a decree are void for uncertainty and some descriptions are not. The courts of California have set up a test to be applied in each case to the facts to determine whether the description of property is so uncertain that the judgment is void or whether the description is sufficiently certain so that the judgment is valid. This test is set forth in *Kittle v. Lang* (1951), 107 Cal. App. 2d 604, 237 P. 2d 673, quoted above. Appellant has not referred to this test in her opening brief. If this test is applied to the facts of this case, there can be no doubt that the description was sufficiently clear to enable the parties to comply with the decree.

II.

The Agreement of 1948 Did Not Transfer the Insurance Policies to Alleen.

At the trial an agreement dated January 28, 1948, between Paul and Alleen was introduced as Alleen's Exhibit "A". This agreement had not been mentioned in any of the pleadings but it was mentioned in the pre-trial order. It is now appellant's contention that this document transferred the life insurance policies to Alleen as her separate property and that they have been her separate property ever since.

By the terms of this document, it is agreed that the real property located in Fontana, which constituted the home of Alleen and Paul, would be deeded to Alleen. The deed was executed and recorded the next day, January 29, 1948. [See opinion Jessie's Ex. 4.] The agreement provides that "on the execution of this agreement, the first party (Alleen) shall have and hold said real property (the home of the parties), together with all personal property that may be located thereon as her sole and separate property * * *." This is the only language in the agreement that could in any way refer to the insurance policies involved in this case.

In other words, it might be contended that the insurance policies were "personal property that may be located thereon" and if so, it was transferred to Alleen. However, according to the testimony of Alleen herself at the trial of this case, these policies were not "located" on the "said real property" * * * "upon the execution of this agreement (January 28, 1948)." Alleen testified that when the agreement was signed, the policies were somewhere else—she got the impression that Paul's

mother, Jessie, had the policies. Then, according to her testimony, about two weeks after the agreement was executed, Paul brought the policies in a shopping bag to the home of the parties, and the policies stayed on the "said real property" for a period of two or three days, and then they were taken to Mrs. Maycock, and about six days later Alleen took them to a bank safe deposit vault in San Bernardino. Accordingly, the only time, according to the testimony, that the policies were ever "located" on the "said real property" was a period of two or three days about two weeks after "the execution of this agreement." [Tr. of Record, pp. 126-128.]

Appellant does not seriously contend in her opening brief that the language of the agreement would transfer the policies. The language of the agreement is not quoted or referred to and no effort is made to show how it could refer to the insurance policies. In the opening brief, pages 30 to 31, counsel seems to base his claim not so much on the agreement as on the circumstances of delivery of the policies to Alleen. At the time, the parties were married and Alleen was the named beneficiary of the life insurance policies. It was decided to place the policies in a safety deposit vault at the bank in San Bernardino and Paul brought the policies out for that purpose. He brought them out to the family home in a bag containing "a great big heart-box of candy. He took the candy out and just left the policies right in the bag, right in the livingroom." At the time Paul brought the policies out to the family home, he said to Alleen, "This is your Social Security." [Tr. of Record, p. 128.] The policies were put in the safety deposit box and left there without any effort to endorse or change the life ownership of the policies. It is submitted that

the policies were community property and that they remained community property and nothing in the testimony of Alleen would indicate that there was any change in their character or ownership.

A further consideration which would indicate that it was not the intent of the parties to change the ownership of the policies was that the policies were not sent to the insurance company for endorsement to show any change in ownership and no notice was given to the insurance company of any assignment. On the other hand, it was the intent of the parties to transfer the real estate and a deed was duly executed and recorded transferring the real estate. If it had been the intent of the parties to transfer the policies, they would have followed the same necessary formalities just as they did in regard to the real estate.

The agreement was received in evidence and interpreted in the Superior Court of San Bernardino County in the divorce action and even though there had been any question whether the policies were transferred by the property settlement agreement, the decision in the divorce action would be *res adjudicata* on the question. The court found that the agreement transformed the real property into separate property of the wife, Alleen, and also found that the life insurance policies were community property of the parties and awarded them to the husband, Paul. [Refer to opinions, orders, findings, decrees and judgments in the divorce action introduced at the trial as Jessie's Exs. 2 and 4.]

III.

The Request for Change of Beneficiary Executed and Delivered to the Insurance Company Was Effective to Change the Beneficiary to Jessie Mildren on All Insurance Policies Involved in This Action.

At the trial it was suggested by the court that the interlocutory divorce decree might be effective to transfer the life insurance policies to the husband, Dr. Paul Mildren, and to cut off all rights of the former beneficiaries. And at the same time the request for change of beneficiary might not be effective to change the beneficiary to Jessie Mildren, the insured's mother. In this case the death benefits would be payable to the estate of the husband, Dr. Paul Mildren.

We believe that this possibility is disposed of by the fact that the request for change of beneficiary was effective to change the beneficiary to Jessie Mildren. The only reason suggested in the pleadings and pre-trial memorandums why the request for change of beneficiary might not be effective is that the policies require that any change of beneficiary be endorsed on the policies and in this case the request for change of beneficiary was submitted to the life insurance company by itself and the policies were never produced so that the life insurance company could not endorse the changes thereon.

This omission to furnish the policies of life insurance for endorsement is excused on two different grounds:

A. The Requirement of the Policies That Any Change of Beneficiary Should Be Endorsed on the Policy Was Excused by the Fact That the Policies Were Not Available and Could Not Be Secured by the Insured.

The testimony and the pleadings show that the life insurance policies were in the possession of Alleen S. Mildren continuously from 1948 until she produced them at the time of trial and they were introduced into evidence. [Tr. of Record, p. 130.] The stipulation of facts also shows that the insured not only demanded the policies but that he prosecuted contempt proceedings which resulted in an order holding Alleen S. Mildren in contempt for her failure to turn over the policies to the insured, Dr. Paul Mildren. The stipulated facts also show that she still refused to turn the policies over even after she was held in contempt for her failure to do so. The record makes it abundantly clear that the policies were not available and that the insured, Dr. Paul Mildren, went to great lengths in his efforts to get possession of them. [Tr. of Record, pp. 74-80.]

A complete and exhaustive annotation of this question is found starting at 19 A. L. R. 2d 5. It is stated in this annotation at page 73,

> "Where the insured does everything in his power to effect a change of beneficiary, the mere fact that he is unable to surrender the policy for endorsement of the change by the insurer because it is inaccessible under the circumstances will not render the change invalid." (Cases in eight jurisdictions are cited as authority for this statement.)

Applying California law, it was also held in *Pacific Mutual Life Insurance Co. v. Rotondo,* 96 Fed. Supp.

197, affirmed in 191 F. 2d 624, that the failure to have the change of beneficiary endorsed on the policy of life insurance is excused by the inaccessibility of the policy.

The rule of law is well settled that it is not even necessary to prove a demand for the policies in order to excuse failure to endorse the change of beneficiary on them if the policies are in the possession of the original beneficiary. (19 A. L. R. 2d 72, art. 29.)

B. The Provision Requiring That Any Change of Beneficiary Must Be Endorsed on the Policies Is a Provision for the Benefit of the Insurance Company and the Company Waived This Requirement by Filing This Interpleader Action.

It is true that the policies in this action provided that any change of beneficiary must be endorsed on the policies to be effective. However, this provision of the policy is for the benefit of the insurance company and may be waived by the insurance company. While there is a conflict of authority as to whether the insurance company can waive this provision after the death of the insured, still all of the California cases hold that filing of an interpleader action by the insurance company waives the requirements of the policy as to method of change of beneficiary so that the original beneficiary cannot claim the benefit of any such provision if the insured has done all that he could reasonably do to change the beneficiary. (*Johnston v. Kearns* (1930), 107 Cal. App. 557, 290 Pac. 640; *Aetna Life Ins. Co. v. Wood* (1934), 2 Cal. App. 2d 579, 38 P. 2d 853; *Shaw v. Johnson* (1936), 15 Cal. App. 2d 599, 59 P. 2d 876.)

IV.

If the Policy Is Community Property, Then It Should Be Delivered to the Executrix of the Last Will of the Husband, Paul Mildren, Deceased.

Appellant suggests the possibility that the court might hold that this policy was still community property at this time. Then she states the rule that the husband cannot make a gift of community property in excess of 50%. If the proceeds are community property, then they are subject to administration in the husband's estate and should be delivered to his executrix. (Calif. Prob. Code, Sec. 202.) If the surviving wife has any claim to the proceeds on the basis of her community property rights, then the claim must be enforced through the probate court, and this court has no jurisdiction to decide to whom the community property should be distributed out of the estate of Paul Mildren, deceased.

> "The court in probate has always exercised jurisdiction over the interest of the surviving wife in the community property in the course of administration upon the estate of a deceased husband. No one of the powers of the court in probate is more firmly settled or more universally conceded and acted upon than this one."
>
> *Colden v. Costello* (1942), 50 Cal. App. 2d 363, 122 P. 2d 959.

V.

The Failure of the Trial Court to Find Whether Paul Had Lawful Authority to Transfer More Than One-half of the Insurance Proceeds Will Not Require Reversal.

We are somewhat uncertain as to just what counsel is complaining of in his 5th argument at pages 33 and 34 of his brief.

The statement is made that the court failed to find specifically on issue No. 3, pages 82 and 83 of the Transcript of Record which reads as follows:

> "(3) In the event that the decree did not transfer title to any policies to the defendant Paul Mildren, were the policies community property? Were they paid for from earnings of the parties, namely Alleen S. Mildren and Paul Mildren, and as to the cross-defendant Donald L. Mildren, did the policy in his favor pass to him upon the death of his father?"

The court found all the facts upon which its judgment is based specifically and in great detail and then found the conclusion:

> "The aforesaid interlocutory and final decrees of divorce and the said court order set forth in Paragraphs X through XV herein were valid and effective to constitute said insured the sole owner of said five policies of insurance as his separate property; * * *." [Tr. of Record, p. 103.]

Having found that the decree did transfer title to the policies to Paul, the issue No. 3 quoted above was fully answered and it became an idle act to go on and find what the situation would have been if the decree had not transferred title to Paul.

Conclusion.

In conclusion we submit that the divorce decree and subsequent proceedings and orders constituted the life insurance policies the separate property of Paul Mildren and that Paul made a valid designation of beneficiary to his mother, Jessie, and that the death proceeds should be paid to Jessie.

Respectfully submitted,

ROBERT MCWILLIAMS,

Attorney for Appellee, Jessie Mildren.